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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. SENG LIA HER, Defendant and Appellant.	A097447 (Humboldt County Super. Ct. No. CR014732)

INTRODUCTION

Appellant Seng Lia Her pleaded guilty to a vehicular hit-and-run, resulting in death, and to filing a false police report. On appeal, he argues that in sentencing him to the maximum four-year prison term on the hit-and-run, the trial court relied on improper factors in aggravation, and improperly weighed the factors in aggravation and mitigation. We reject these contentions and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND[1]

Around 2:30 a.m. on November 1, 2001, appellant was driving along a deserted street in Eureka, accompanied by a friend, when his car struck a man who was sitting in the middle of the road,[2] dragging him approximately 100 to 150 feet. When the accident

[1] Defendant pleaded guilty, so the facts, which are undisputed, are taken from the probation report.

[2] An autopsy later revealed that the victim had a .24 percent blood alcohol content. A friend with whom the victim had been drinking during the evening reported that the

happened, appellant, who had just turned 18 years old, panicked and drove off the road into a marsh. Appellant left his car there, and he and his passenger walked to his house. They later returned to appellant's car to retrieve the passenger's belongings. Appellant neither tried to assist the victim in any way, nor notified the police of the accident.

Later the same morning, about 7:30 a.m., appellant called the Eureka Police Department and reported that his car had been stolen. Appellant represented to the police that he had parked his car outside his house around 9:00 p.m. the previous evening, and had found it missing when he woke up. By then, the accident had been reported, the victim had been found dead at the scene, and appellant's car had been discovered nearby, with blood on it. Appellant voluntarily went with the investigating officer to the police station, where he agreed to take a polygraph test at the officer's request.

After the polygraph, appellant asked to speak to the investigating officer again. At that point, appellant admitted having driven the car at the time it struck the victim, but continued to claim that he had not been speeding and that he had not consumed any alcohol prior to the incident. In fact, the police investigation later concluded that defendant had been traveling at "freeway speed" when the accident occurred. Also, appellant's passenger told the police that appellant had been drinking beer before the accident, and was going "really fast" when he hit the victim. Appellant ultimately admitted that he had had about three beers between 11:00 p.m. and 1:30 a.m. the night of the accident. By the time his blood was drawn some time after 10:30 a.m. the following morning, however, it tested negative for alcohol.

After the blood test, appellant was taken to jail. He was arraigned on November 2, 2001, and charged with violations of Vehicle Code section 20001, subdivision (a), hit-and-run driving causing a death, and Vehicle Code section 10501, subdivision (a), filing a false report of a stolen vehicle. On November 15, 2001, he pleaded guilty to both counts. The guilty plea was not the product of a plea bargain.

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victim had apparently wandered off while waiting for the friend to fetch a car in which to drive him home.

Before imposing sentence, the trial judge reviewed the probation report and received statements from relatives and friends of both appellant and the victim, as well as arguments of counsel. The trial judge explained that he had originally considered a county jail term to be followed by supervised felony probation as the appropriate sentence, but a review of the facts had caused him to conclude this initial impression was wrong, and that a prison term was appropriate.

In announcing his sentencing decision, the trial judge found three reasons for imposing the aggravated term, as discussed in more detail below. Consistent with the probation report, he expressly found that no mitigating factors existed. Based on these findings, he sentenced appellant to the aggravated term of four years in state prison on the hit-and-run count, plus the maximum of six months on the false report count, to run concurrently, plus restitution.

DISCUSSION

Appellant argued in the trial court that he should receive probation, conditioned on substantial jail time followed by community service. On appeal, he does not contest the denial of probation, but argues that the trial judge erred in two respects in imposing the aggravated prison term. First, he contends that the judge considered improper factors in aggravation. Second, he maintains that the judge erred in weighing the aggravating and mitigating factors, and specifically in finding that there were no mitigating factors.

A. Reliance on Improper Aggravating Factors

The three aggravating factors relied on by the trial judge were: (1) that the crime showed extreme callousness (Cal. Rules of Court, rule 4.421(a)(1));[3] (2) that appellant had also pleaded guilty to the misdemeanor, which could have resulted in a consecutive term (rule 4.421(a)(7)), and (3) that appellant's juvenile convictions were numerous and of increasing seriousness (rule 4.421(b)(2)). Appellant contends that the first and third factors were improper. We disagree.

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[3] All references to rules are to the California Rules of Court.

Appellant argues that in relying on the callousness of the crime, the trial court erroneously relied on elements of the offense as an aggravating factor. Appellant is correct that failing to report the accident and failing to render aid to the victim, standing alone, are elements of the offense. The trial judge's comments earlier in the sentencing hearing make clear, however, that in referring to "extreme callousness," he was relying on the additional facts that appellant made no effort to stop before hitting the victim, dragged him 150 feet, and—most significantly—*returned to the scene of the accident* to collect his passenger's belongings, and yet *still* did not check on the victim's condition or do anything to assist him, even though the victim was obviously seriously injured, and prompt medical intervention might have saved his life. None of these facts is an essential element of the crimes to which appellant pleaded guilty, and we do not find any error in the trial judge's having considered them as aggravating.

With respect to appellant's juvenile record as an aggravating factor, we disagree with appellant's contention that the trial judge erred in characterizing the offenses as numerous and of increasing seriousness. In our view, appellant's record can fairly be so characterized.[4]

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[4] In December 1996, appellant shoplifted an audiocassette case, for which he completed diversion. In June 1997, he was charged with resisting arrest, disorderly conduct, and alcohol possession, arising from an incident in which he and other juveniles ran away from police in a store parking lot. He admitted these violations and was declared a ward of the juvenile court. In November 1998, he was reprimanded for violating his juvenile probation by skipping school twice and having been found in a car with other wards near the site of an auto burglary. In December 1998, charges of possession of 0.2 grams cocaine were dismissed with a "Harvey reservation." The same month, appellant admitted he had threatened a teacher at his high school after a verbal altercation, and was found to have violated his probation. In January 1999, appellant was ordered to a PACE (Probation Alternatives in a Community Environment) program, which he completed satisfactorily in March 2000. After that, he was reported not to have been abiding by the terms of his probation, because he had quit his job, was not reporting to his probation officer, was associating with persons he had been directed not to associate with, and had poor school attendance. Nonetheless, no probation violation charges appear to have been pursued, and in September 2000, shortly after his 17th birthday, he successfully completed probation and his wardship was terminated.

Appellant also urges that, as of the accident date, he had gone almost three years without re-offending. This was a relatively brief period of good behavior, however, and was marred by poor compliance with probation in the period between March and September 2000. Thus, we do not find that the trial court abused its discretion in determining that appellant's juvenile record was an aggravating factor.

B. Failure to Take Mitigating Factors into Account

We also disagree that the trial court erred in finding there were no mitigating sentencing factors. Such a finding rebuts the rule 4.409 presumption that, where the record is silent, the trial court is presumed to have considered and rejected whatever mitigating factors may be reflected in the record. (*People v. Burney* (1981) 115 Cal.App.3d 497, 505.) Accordingly, because the trial court in this case made an express finding that no factors in mitigation were present, we must determine whether the trial judge erred in failing to consider mitigating circumstances disclosed by the undisputed facts. (*Ibid.*)

Appellant argued briefly in the trial court, and again in cursory fashion in this court, that the crime arose in the context of "an unusual circumstance, such as great provocation, which is unlikely to recur," and for this reason was a mitigating factor the sentencing court failed to consider. (Rule 4.423(a)(3).) We disagree. It was utterly irresponsible for appellant to have driven at "freeway speed" on a city street, possibly under the influence of alcohol, even in the middle of the night. While pedestrian traffic would be expected to be light, the chances of meeting a person on foot or in another vehicle would not be unusual. To be sure, the presence of a person sitting in the middle of the street, apparently too intoxicated to appreciate the danger of his position or get out of the way, is quite unusual. But we do not consider the act of running down such a helpless pedestrian, regardless of their reason for being in the roadway, sufficiently "unusual" as to justify invocation of this mitigating factor.

Moreover, we note that appellant was not convicted of or held criminally responsible for the accident itself, but instead for his failure to report it, and for attempting to deceive law enforcement about his involvement in the accident. In this

regard, we see nothing about these acts that constitute an "an unusual circumstance . . . which is unlikely to recur." Certainly, the fact that an automobile accident is witnessed only by the driver and his or her passenger does not make it "unusual." Thus, we conclude the trial judge did not err in failing to consider the unusual circumstances of the offense as a factor in mitigation.

DISPOSITION

The judgment is affirmed.

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Ruvolo, J.

We concur:

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Kline, P.J.

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Haerle, J.